



Generally Speaking

COMINGS and GOINGS

Please Welcome:

AAGs Lisa Reynolds and Denise Louttit to the Anchorage Child Protection Section.

Sheena Scott, Internet Specialist, Anchorage Legal Support Services Section.

AAG Tom Dosik, Labor and State Affairs Section, Anchorage. AAG Dosik is assigned to the Office of Rate Review.

AAG Michele Powdrill joined the Juneau Commercial and Fair Business and Environmental Sections. Prior to coming to the department she was at the Department of Natural Resources.

The Juneau Transportation and Labor and State Affairs Sections welcomed **LOA I Kendra Kloster.** Kendra recently moved to Juneau from Colorado.

The Anchorage Labor and State Affairs Section congratulates **Litigation Assistant Kamie Willis** on the arrival of son Hudson Willis.

The Child Protection Section is pleased to report **AAG Matt Wilkins** became a member of the staff at the Palmer offices this month. The Anchorage offices also bid farewell to **AAG Rebecca Karstetter** who left the section to join the Office of the Public Defender.

Diane Ivy-Dahlin relocated from Seward to Anchorage to join the Regulatory Affairs and Public Advocacy (RAPA) "north" office as an **LOA I.**

The Bethel DAO reports **ADA Patty Burley** applied for and was awarded the position of Bethel magistrate.

The Juneau Oil, Gas and Mining Section is pleased to welcome **Linda Ward-Taremi, LOA I,** who recently moved from Oklahoma to Juneau. While in Oklahoma Linda worked for the Oklahoma Historical Office, and other employment in Alaska includes the Ketchikan Public Defenders Office and Department of Natural Resources, Division of Forestry.

The Fairbanks DAO reports **ADA JB Brainerd** took the Alaska bar exam and awaits the May results.

Congratulations are in order to **ADA Joe Dallaire** and his wife on the birth of Joe, Jr. who arrived on Valentine's Day. The offices bid a sad farewell to **Amanda Norris** who moved on to an

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LOA I position in the Office of Special Prosecutions and Appeals in Anchorage.

CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in the Office of Children's Services (OCS) petitions:

OCS responded to a protective services report alleging the death of an infant. Upon investigation, it was discovered the parents were highly intoxicated and had been drinking with their 13-year-old who was intoxicated as well. The teen was transported to the hospital with alcohol poisoning. The infant was non-responsive and was later pronounced dead. OCS assumed emergency custody of the 13-year-old.

OCS assumed emergency custody of an infant whose mother has severe mental health issues. The mother has other children in the system and is unable to parent them. The father also has mental health issues. OCS placed the child with relatives.

In the summer of 2001, OCS worked with a family in creating a safety plan that would keep a known sex offender out of the home and away from the children. In February 2008 a report was made that the mother was allowing the sex offender back in the home. The report also alleged the children were not attending school on a regular basis and that they were unkempt when they did go. Upon further investigation, OCS found both the sex offender in the home and the home to be filthy to the point of being unsafe for children. OCS assumed emergency custody of the children.

OCS responded to a report of harm that a child had been born drug exposed. The mother had no prenatal care and has a long history of substance abuse. The father is a registered sex

offender and is prohibited from having contact with females under the age of 18. OCS assumed emergency custody.

OCS received a report from the Anchorage Police Department that a small child was found wandering alone at a local hotel. Upon investigation, it was discovered the parents had passed out from alcohol and were not watching the child. The father is a registered sex offender for sexual abuse to a minor. The mother was arrested and OCS assumed emergency custody.

OCS assumed emergency custody of two children who had been left with a relative after their parents failed to return and pick them up. The children needed medical care. The mother has a history of substance abuse and the father's whereabouts are unknown.

Numerous children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/ or incarceration.

Commercial and Fair Business

Consumer Protection Settlement With HCI Direct, Inc.

Alaska entered into a multi-state settlement agreement with HCI Direct, Inc., a direct marketer of women's hosiery (known as Silkies hosiery), requiring the company to change its marketing practices and pay the states a total of \$455,000 to settle charges it violated the states' consumer protection statutes. The states' alleged that HCI's conduct in running its "continuity sales plan" violated consumer statutes in failing to clearly and conspicuously disclose all of the material terms of the plan, including the fact that after the consumer accepted a "free" sample of the hosiery, the consumer would be automatically enrolled in the plan. The settlement, which was filed in court as an assurance of voluntary compliance, requires HCI to include clear and

conspicuous disclosures of all material terms of any offer in its solicitations, and requires an affirmative response from consumers before enrolling them in a continuity sales plan or providing any merchandise, including free samples. AAG Julia Coster represented the state in this case.

Superior Court Upholds Revenue Determination Regarding Illegal Gaming

Alaska Native Brotherhood Camp 2 v. State, Department of Revenue. Superior Court Judge Mark Rindner recently affirmed an administrative determination of the Department of Revenue that a game designed by the Alaska Native Brotherhood (ANB) for use in its charitable gaming operation was not bingo for purposes of the charitable gaming laws. Therefore ANB may not offer the game without violating the criminal ban on gambling. To qualify as legal bingo, a game must provide for players to mark their bingo cards or paper while numbered balls are being hand drawn from a mixing device and announced. Judge Rindner found that the game wasn't bingo because the drawing of balls would stop after the 25th ball had been called. Players would then have to purchase bingo paper until they bought one with the winning combination of numbers. AAG Dan Branch represented the department in the case.

Professional Teaching Practices Commission Suspend Educator's Teaching Certificate

On February 13 the Professional Teaching Practices Commission suspended the teaching certificate of Patricia Hamre for one year for breaching her ethical duties to "accord just and equitable treatment to all students" and to "cooperate in the statewide assessment system." In addition to the suspension, the commission is also requiring Ms. Hamre to complete remedial training on testing procedures and prohibiting her from proctoring any state-mandated assessments during the period of suspension.

The commission found that Ms. Hamre, in administering the Standard Based Assessment test of 2007 to her third grade students, violated school laws of the state when she allowed her students to (1) use reference materials, (2) directed her students to alter their tests after the tests were completed, and (3) read test items, all of which are in violation of 4 AAC 06.765.

In addition, the commission found that Ms. Hamre's conduct violated the Code of Ethics and Teaching Standards by failing to maintain the confidentiality of the testing materials and information and by failing to "accord just and equitable treatment to all students as they exercise their educational rights and responsibilities." With respect to Ms. Hamre's treatment of her students, the commission stated, "When the proctor of a statewide test used to allocate educational resources prompts and assists her students in a variety of unauthorized ways, she gives her students an unjust and inequitable advantage in violation of this standard." AAG Karen Hawkins represented commission staff in this proceeding.

Medical Board to Decide if Doctor Violated Statutes and Regulations

In January, AAG Karen Hawkins represented the Division of Corporations, Business and Professional Licensing in an administrative hearing before Administrative Law Judge (ALJ) Kay Howard, the designated hearing judge for the State Medical Board. The issues before the board are (1) whether Dr. Erik Kohler engaged in fraud, deceit or intentional misrepresentation when he failed to reveal prior investigations conducted by the Washington Medical Quality Assurance Commission (a commission equivalent to the Alaska State Medical Board), (2) whether Dr. Kohler failed to disclose material information in obtaining or renewing a license when he failed to reveal prior investigations conducted by the Washington Medical Quality Assurance Commission, and (3) whether Dr. Kohler timely filed a medical malpractice settlement report on the required division form with the board. Testifying for the

division were three investigators and one administrator from the Washington Medical Quality Assurance Commission, the board's executive administrator and licensing examiner, and the division's investigator. Dr. Kohler presented only one witness, himself. ALJ Howard has until March 16 to prepare a proposed decision in the case, which will be presented to the board for its consideration at its April 3-4 meeting.

Human Services

Litigation Update

ITMO: Shirley Agcaoili v. State of Alaska, Department of Health & Social Services, Division of Public Health. AAG Rebecca Polizzotto is representing the Department of Health & Social Services (DHSS) in a licensing action involving the owner/administrator of three assisted living homes. The department is seeking revocation of the administrator's licenses. This case involves alleged elder abuse and neglect and the investigation has expanded to include alleged Medicaid fraud, public assistance fraud and permanent fund dividend fraud. Opposing counsel filed a motion to dismiss which AAG Polizzotto successfully opposed.

Nichole Danz v. State of Alaska, Department of Health & Social Services, Division of Health Care Services. AAG Rebecca Polizzotto reached a settlement with opposing counsel regarding this Medicaid audit appeal. The settlement results in the department recouping approximately \$34,000 in Medicaid overpayments from this provider.

Medicaid

Subrogation/Liens

During the month the Medicaid third-party liability subrogation/lien recovery team resolved 21 matters. Medicaid reimbursement was obtained for 9 of the 21 matters and 11 were closed with no recovery. One estate recovery matter was

resolved after collection of \$12,952.52. The total amount recovered for February to date is \$45,486.35. The current inventory of open third-party liability matters is 716 files. The current inventory of Medicaid estate and trust recovery matters is at 68 open files.

Other

Section Chief Stacie Kraly spent the better part of the month working on legislation, specifically, the Governor's Health Care Transparency Bill.

The section worked on a number of "notice" projects for the Department of Health and Social Services (DHSS) this past month. AAG Robin Fowler completed a review of day care assistance notices. AAG Nevhiz Calik completed a review of notices related to the new Fetal Alcohol Syndrome/Fetal Alcohol Spectrum Disorder (FAS/FASD) waiver that is being implemented by DHSS.

Labor and State Affairs

Education

K.R. v. State, Department of Education and Early Development. The Disability Law Center (DLC) filed a due process hearing against the Department of Education and Early Development (DEED) concerning a dispute over pupil transportation of a student with a disability, and the state moved for summary judgment. Hearing Officer Jonathon Katcher dismissed because the school district, not DEED, was the proper respondent. Judge Beistline of the U.S. District Court affirmed the hearing officer's decision on appeal. On February 4 DLC appealed to the Ninth Circuit Court of Appeals. AAG Neil Slotnick handled the matter below, and AAG Rachel Witty will represent the department in the appeal.

Employment

State v. Alaska State Employees Association. On February 8 AAG Bill Milks argued this case before the Alaska Supreme Court. The dispute is over an award of prejudgment interest in a superior court action to enforce an arbitration award. The appeal addresses whether the superior court is empowered to supplement an arbitration award by adding a remedy not provided in the arbitration and whether the state has sovereign immunity against an award of prejudgment interest in a labor relations grievance arbitration. The Court took the matter under advisement.

State v. EEOC (Equal Employment Opportunity Commission). On February 11 AAG Brenda Page filed the state's response to the petitions for rehearing and for rehearing en banc filed by respondents EEOC, U.S., and Intervener Margaret G. Ward. These motions follow the decision of a three-judge panel of the Ninth Circuit, which held that the 11th Amendment provides the state with immunity from claims by individuals under the Government Employees Rights Act (GERA). GERA was enacted in 1991 to extend the protections of Title VII to elected officials' personal staff and advisors. The employment claims were filed with the EEOC by two members of Governor Hickel's personal staff who were discharged in 1994.

Human Rights Commission

Villaflores v. Alaska State Commission for Human Rights. On February 8 the Alaska Supreme Court issued its decision in this case. Mr. Villaflores had unsuccessfully applied for the position of human resources representative with ConocoPhillips. He then filed a complaint of age and race discrimination with the commission. The commission's staff investigated the case and eventually dismissed it, finding that the claim was not supported by substantial evidence. The Court concluded the commission's decision to dismiss was supported by substantial evidence and affirmed the agency's

decision. It agreed with the commission that Villaflores did not have a prima facie case of discrimination because, although he was a member of a protected class, he did not satisfy the employer's qualification of a significant amount of work experience. The Court also rejected Villaflores's claim that an employer must hire the most qualified applicant for a position or face liability under the employment discrimination statute. Villaflores had argued he possessed qualifications superior to those of the successful applicant who did not have a degree in human resources. The Court suggested that employers retain a significant amount of discretion in making determinations regarding the relative qualifications of candidates. AAG Bill Milks represented the commission.

Billingham v. Human Rights Commission. On February 15 Superior Court Judge Volland issued his determination after remand, affirming the commission's conclusion that this former employee of the Department of Transportation and Public Facilities lacked a prima facie case of unlawful sex and age discrimination against the state. AAG Bill Milks represented the commission in the appeal.

Motor Vehicles

Huntley v. State, Department of Administration, Division of Motor Vehicles, and Duane Bannock. On January 29 Superior Court Judge Pallenberg granted summary judgment to the state dismissing on the basis that the plaintiff lacked standing. Huntley had challenged the validity of a regulation (2 AAC 90.420(d)) requiring an applicant to present a social security number or an approved waiver from the Social Security Administration or IRS to obtain a drivers' license. Because Huntley did not face any harm from the requirement and because she did not establish facts showing that she was a proper plaintiff for taxpayer-citizen standing, the court found that she lacked standing to challenge the regulation and granted summary judgment in favor of the state defendants. AAG Krista Stearns represented the state in this matter.

Poirot v. State of Alaska, Division of Motor Vehicles. On February 15 AAG Krista Stearns filed an appellee's brief with the Alaska Supreme Court. The appellant is seeking reconsideration of a division decision to revoke a drivers' license that was made 16 years earlier. The superior court had found the decision untimely and declined to consider it and Mr. Poirot appealed.

Jemewouk v. State, Division of Motor Vehicles. On February 19 Superior Court Judge Torrisi affirmed the decision of the Division of Motor Vehicles. Jemewouk's driver's license was revoked after he was arrested for DUI and he refused to take a breath test. He then requested a blood test asking that his daughter be allowed to take the blood, even though she worked in Anchorage and he was arrested in Palmer. The officers declined to take him to Anchorage, and he argued that this constituted a denial of his right to an independent blood test, warranting reversal of his license revocation. Judge Torrisi rejected this argument, holding that even a Thorne presumption that the blood test would have been favorable to Jemewouk would not have affected the outcome of the inquiry into whether he had refused to take the breath test. AAG Mags Paton-Walsh represented the Division of Motor Vehicles.

Public Offices Commission

Stevens v. APOC (Alaska Public Offices Commission). Judge Rindner issued his decision. The case is Senator Ben Stevens's appeal from an Alaska Public Offices Commission decision that he violated the requirements of the legislative financial disclosure law by failing to report income that he chose to defer but earned as a board member in 2005. The court found that a 2007 amendment to the reporting requirements to add an express requirement to report deferred income supported the former senator's argument that the reporting of deferred income was not mandated before the amendment. The state has appealed the decision with the Alaska Supreme Court. AAG Mags

Paton-Walsh is handling this matter for the commission.

Retirement and Benefits

The Office of Administrative Hearings issued a proposed decision on February 15 recommending the denial of a claimant's request for a waiver of the deadline for applying for occupational disability benefits. The deadline is no later than 90 days after terminating employment. The administrative law judge concluded that failing to read the materials provided in an application packet or to anticipate the deadline did not constitute extraordinary circumstances justifying the delay and proposed to the Commissioner of Administration that the waiver be denied. AAG Toby Steinberger handled this matter for the Division of Retirement and Benefits.

Legislation and Regulations

During February the Legislation and Regulations Section spent a busy month editing legislation and an executive order for introduction in the regular session. The section also edited bill reviews for bills passed during the regular session. The section also edited and legally approved for filing the following regulations projects: 1. Department of Health and Social Services (tamper-resistant prescriptions for Medicaid program); 2. Board of Fisheries (Lower Cook Inlet Area Subsistence, Personal Use, Sport, and Commercial Finfish and Shellfish fisheries); 3. Department of Transportation and Public Facilities (rural airports and airport tie-downs at rural airports); 4. Department of Commerce, Community, and Economic Development (occupational licensing fees for naturopaths and certified nurse aides; Real Estate Commission education requirements; Board of Nursing regulations for nursing education programs and authorization to practice as an advanced nurse practitioner; trust company regulations); and 5. Department of Administration ("single audit" regulations).

Natural Resources

Estate of William L. Carr v. State, Commercial Fisheries Entry Commission (CFEC). On February 20 the parties in this appeal of a CFEC decision denying the application of the Estate of William L. Carr for a Southeastern Roe Herring Purse Seine fishery entry permit, stipulated to dismiss this appeal with prejudice, each side to bear its own costs and fees in the appeal. In consideration of the dismissal, the parties agreed that upon appropriate application and payment of fees, the CFEC will issue to the Estate a Southeastern Roe Herring Purse Seine fishery Interim Use Permit for the 2009 fishing season, but that the Estate will not be entitled to or issued an Interim Use Permit in the subject fishery after the 2009 fishing season. AAG Vanessa Lamantia represents the state in this case.

Katie John – “Which Waters” Litigation. On January 28, 2008 the state filed its brief in opposition to the opening briefs of the Katie John and Peratrovich plaintiffs in the “which waters” consolidated action pending in the United States District Court, District of Alaska. The state had previously filed its opening brief. In that lawsuit several parties are challenging claims by the United States that it has federal subsistence jurisdiction in waters throughout Alaska under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) and the federal reserved water rights doctrine. The state contends that the United States’ claims are overbroad, including its claims that the federal subsistence priority applies to waters (1) next to but outside of the boundaries of federal reservations such as national parks, refuges and forests, including long stretches of the Yukon River and large lakes; (2) bounded by reservation “in-holdings” owned by the state or in private ownership; (3) bounded by state and Alaska Native Corporation selected-but-not-yet-conveyed lands which receive special treatment under ANILCA; and (4) consisting of marine

and tidal waters at the “mouths” of rivers and in bays.

Other plaintiffs claim that the Federal Government’s claims are under-broad. They claim that the federal agencies, in order to fulfill their responsibilities under ANILCA, were required to assert the ANILCA federal subsistence priority over virtually all fresh and salt waters throughout Alaska – in particular those located (1) “upstream” or “downstream” of federal reservations; (2) within or next to the thousands of individual Native allotments in Alaska; and (3) in all marine waters, even those extending several miles seaward from the Alaska coastline. The state’s next filing, a reply brief in response to the United States’ filing in January defending its actions, is due March 17, at the same time as other plaintiffs’ replies. The court’s decision is expected a few months later.

Upper Cook Inlet Board of Fisheries Meeting Completed

The Board of Fisheries held its Upper Cook Inlet regulatory meeting February 1–12 in Anchorage. The board considered 285 regulatory proposals and a number of supplemental issues involving some of the most controversial fisheries in the state. Notably, the board identified Susitna River sockeye as a stock of yield concern and approved a Department of Fish and Game action plan for ascertaining stock status and for prevention of further declines while information regarding stock status and causes of decline is being gathered. The board made only minor adjustments to commercial and sport fisheries, but did modify management plans in the commercial fisheries to give the commissioner greater guidance as to which management goals take precedence. The board also expanded the commissioner’s discretion in attempting to achieve those goals. AAG Steven Daugherty covered the meeting and will work with Department of Fish and Game staff and the Legislation and Regulations Section on the regulations coming out of the meeting.

Opinions, Appeals & Ethics

Ethics

AAG Judy Bockmon completed review and commented on a Department of Natural Resources guide regarding department employee participation in its land sales programs. She is also working on the public summary of the quarterly reports from the ethics supervisors.

Additionally, AAG Bockmon has been working with department Legal Office Administrator Melanie McKeever to update the department's ethics orientation materials and improve ethics education for new staff. She is responding to requests for ethics training on a request by request basis and currently has several trainings scheduled for agencies and boards. She received and granted four requests for conflict waivers this month.

This month the section completed the investigation of one significant complaint resulting in a dismissal. The section is also actively working on two other investigations. One complaint file was closed for failure of the complainant to respond to a request for additional information and compliance with the statutory requirements. An additional complaint did not meet the statutory requirements and the section is seeking additional information and compliance.

Appeals/Litigation

Maisy W. v. State, Department of Health & Social Services, Office of Children's Services (S-12704). The state supreme court released a decision in this case affirming the termination of parental rights of a mother to her children. The children were found to be in need of aid pursuant to AS 47.10.011(1), (8), (9) and (10). The mother conceded in her reply brief that these jurisdictional grounds had been met. Although she only summarily argued in her opening brief that she adequately remedied

the conduct that placed the children in need of aid, in her reply brief the mother more fully addressed this issue. As such, the supreme court declined to find (as the Office of Children's Services (OCS) requested) that this issue was waived. The supreme court then summarily concluded that the mother failed to remedy her conduct based on her failure to comply with her case plan, on the receipt of reports of harm during a trial home visit, on evidence indicating the mother was still using controlled substances and engaging in violent conduct, on her failure to ensure that one of her children went to school, on her failure to cooperate with OCS, and on her failure to maintain a violence-free household.

The supreme court also rejected the mother's active efforts argument, noting that the trial court must consider not only the "parent's demonstrated lack of willingness to engage in treatment" but "the state's involvement [with the family] in its entirety." Applying this standard, the supreme court concluded that OCS made active efforts, as required by the Indian Child Welfare Act (ICWA). The court first noted that OCS failed to make active efforts for a three-month period in 2005 (as found by the trial court below and conceded by OCS on appeal); it then turned to the entirety of OCS's efforts from 2004 through 2007 and concluded that these efforts constituted active efforts. Such efforts included creating multiple case plans for the family; providing transportation for UAs; providing referrals and some funding for domestic violence classes, parenting classes, and a substance abuse assessment; arranging for visitation; conducting home visits; coordinating with Native-oriented services; and assisting with housing and telephone services. AAG Megan Webb was the appellate attorney and AAG Poke Haffner was the trial attorney.

Smith v. Stafford (S-12255). The supreme court also issued a decision in this case. It was brought by a father in a child-in-need-of-aid (CINA) case, who sued an Office of Children's Services (OCS) social worker and her supervisor after his daughter was returned to his custody

and the CINA case was dismissed. The father brought thirteen claims against the defendants, alleging both state law claims and a § 1983 claim. The trial court granted defendants' motion for summary judgment, dismissing all of the claims under the doctrine of collateral estoppel. In the alternative, it found that the defendants were entitled to qualified immunity (under both federal and state law). The supreme court affirmed in part and reversed in part. As such, the case will be remanded on the common law defamation and false light claims against the social worker only.

First, the supreme court noted that several of the father's state law claims alleged that the defendants failed to comply with statutorily mandated procedures for CINA cases. While recognizing that AS 47.10.005-.142 create certain obligations for OCS officials in CINA cases, the supreme court concluded that these statutes do not create a private negligence cause of action for failure to comply with such obligations. As such, the court concluded that these claims failed as a matter of law. In a footnote, the court explained that "parents who find themselves in conflict with OCS officials have remedies that may well be superior to after-the-fact civil suits," including administrative remedies and immediate appellate review of placement and visitation orders in a CINA case. [This argument had not been considered below.]

Second, the supreme court considered whether the defendants were entitled to absolute or qualified immunity under the state law doctrine of official immunity. The court first considered whether the defendants' conduct fell within the scope of their authority and constituted discretionary acts. It concluded that this prong was met because the alleged investigations, reports, and recommendations were the type of actions that social workers and supervisors undertake in CINA cases and the nature of OCS's duties implicates the use of discretion (e.g., determining what constitutes a safe and stable placement for a child). It then considered whether the defendants were entitled

to absolute or qualified immunity. The court rejected the defendants' argument that they were entitled to absolute immunity, concluding that only qualified immunity applied.

Finally, the court considered whether the defendants were entitled to qualified immunity as a matter of law. Under state law, an individual is only entitled to qualified immunity if the acts were done in good faith, not maliciously or corruptly. Because there was a material question of fact regarding the social worker's state of mind with regard to the father's defamation and false light claims (*i.e.*, did the social worker arrange beer cans in a pile behind the father's house and then take a picture in an attempt to suggest he had a drinking problem), the court found that the trial court erred in granting summary judgment on these claims.

As to the remainder of the state law claims, the court concluded that the father failed to identify any admissible evidence that would create an issue of fact regarding the defendants' state of mind, justifying the trial court's decision to grant them summary judgment. As such, the court remanded only the defamation and false light claims against the social worker; the portion of the order dismissing all of state law claims against the supervisor was affirmed.

Finally, in relation to the § 1983 claim, the court held that the father's claims that the defendants made false statements during the CINA investigations and conspired to prevent him from retaining custody of his daughter failed to allege a violation of a constitutional right because they were "conclusory assertions without the leaven of confirming factual details." In addition, the court found that a reasonable official in the social worker's position would not have understood that she was violating the father's due process or parental rights by placing the child in foster care with the CINA court's approval. As such, it affirmed the order dismissing the § 1983 claim.

The supreme court did not address the trial court's ruling on collateral estoppel. AAG Paula

Jacobson was the trial attorney and AAG Megan Webb was the appellate attorney.

Samuel H. v. Office of Children's Services (S-12610). In a third case, the Alaska Supreme Court reversed the trial court's termination of an incarcerated father's parental rights to his child. The father, who was in jail when the child was born to a cocaine-abusive mother, testified that because the family knew the Office of Children's Services (OCS) was likely to become involved with the family they agreed that the maternal grandmother would take care of the baby. The father testified that he participated in this decision by telephone. Upon leaving the hospital, the mother and child moved in with the maternal grandmother and OCS did not intervene. However, when the mother took the baby from the home, OCS took custody and placed the child back with the grandmother, without consulting with the father.

Because reunification efforts for the mother were not successful and the father was to be incarcerated for several years, OCS petitioned to terminate the parents' rights to the child so that the grandmother could formally adopt her. A father's rights may be terminated if, among other requirements, he will be incarcerated for a significant period of the child's minority, the mother is unavailable, and the father has not made adequate arrangements for the child during the period of incarceration. The sole issue in this case was whether the father had made arrangements for the child's care.

The state argued that his mere acquiescence in OCS's placement decision did not amount to the father's having made adequate arrangements but that something more – such as taking steps to have the grandmother appointed the child's legal guardian, signing a power of attorney giving the grandmother legal authority to act as the child's care provider, or providing OCS with an alternative plan in the event that the placement with the grandmother did not work out – was required for the father to claim to have arranged for the child's care.

The supreme court disagreed, holding that the father “may not have made formal arrangements with OCS, but his testimony indicates that he did make arrangements in the only way he knew how – by arranging with his family members to assure that [the child] had a safe home in the care of someone other than the baby's drug-addicted mother. To require any more formality would impose a substantial and unnecessary burden on incarcerated parents”

Because the trial court had not made factual findings regarding the father's testimony that he arranged to place the child in the grandmother's care or commented on the father's credibility, the supreme court remanded the case for the trial court to make such findings. AAG Mike Hotchkin briefed the appeal.

A.H. v. State, Office of Children's Services (OCS). AAG Megan Webb filed an appellee's brief in a termination of parental rights case in which a mother challenged the order terminating her rights to two of her daughters. On appeal, the mother asserted that her daughters were not in need of aid and that the trial court erred finding that the Office of Children's Services (OCS) made reasonable efforts to reunify the family and then in excusing it from making further efforts. On behalf of OCS, AAG Webb argued that the trial court did not err in concluding that the children had been neglected given that while living with their mother, the girls were exposed to substance abuse, alcoholism, prostitution, violence, and unsafe living conditions. There was evidence that they sometimes lacked food, were dirty, missed school, and did not receive routine dental treatment. There was also evidence that the young girls sometimes cared for themselves; sometimes their older sister cared for them; and at other times, their mother asked prostitutes, who were living with the family, to care for the girls.

In relation to the second issue, AAG Webb argued that it was appropriate to excuse OCS from making continued efforts at reunification because, over the years, OCS had offered a variety of services to the family, including referrals

for home-based services, neuropsychological evaluations, substance abuse assessments, mental health evaluations, counseling, and UAs; scheduled nightly telephonic visits and weekly supervised visits; assisted with transportation; and helped the mother obtain disability benefits; while the mother generally declined to participate in services or to cooperate with OCS or her case plan. Under the circumstances, OCS clearly made the requisite efforts and it was not error to excuse OCS from making additional efforts.

Paxton v. State. AAG Mary Lundquist completed briefing in this case, an Alaska Supreme Court appeal. The main argument in the state's brief is that Paxton (a pro se litigant) has waived all of his arguments because of his failure to adequately brief the issues. Mr. Paxton brought a tort action against the state for how the Child Support Services Division (CSSD) handled his child support obligation case. The superior court granted the state summary judgment on all of Paxton's claims based on res judicata, statute of limitations, and immunity. Mr. Paxton's daughter for whom he owed child support is now 24. Paxton has paid (involuntarily and voluntarily) only about \$3,000, and his arrears are approximately \$70,000.

Regulatory Affairs and Public Advocacy (RAPA)

Attorney General Appellee Brief

4FA-07-1360 CI, Fairbanks Water & Sewer.

On February 19 the Attorney General/RAPA timely filed its appellee brief before the Fairbanks Superior Court in the utility's appeal from final orders of the Regulatory Commission of Alaska (RCA) involving the joint rate cases (U-05-43/U-05-44) of Golden Heart Utilities and College Utilities Corp., providers of regulated water and sewer service in Fairbanks. The issues on appeal involve the RCA's reduction or disallowance, responsive to Attorney General

advocacy at hearing, of numerous items in the utilities' respective revenue requirements, and the commission's assessed interest on the resultant refunds due customers.

New Cases

RCA/U-07-49, Egegik Electric. Responsive to informal complaints regarding alleged management and financial problems of Homer Lee Leonard d/b/a Egegik Light & Power (EL&P), the commission opened a docket of investigation on April 13, 2007. Thereafter, reported EL&P power outages led to a site inspection and field reconnaissance report which indicated that the power plant requires replacement. The utility's fitness and ability to provide reliable service is in question. Various other state agencies have been alerted to the situation. The RCA is authorized to revoke or suspend a utility's certificate to serve for good cause.

On February 4 in response to the commission's request, the Attorney General/RAPA filed a notice of election to participate in the case on a limited basis to address the public interest in ensuring that continuity of service is maintained for the community of Egegik. A procedural schedule for further commission action has not been set.

RCA/U-08-04, AWWU Depreciation Study.

Anchorage Water & Wastewater (AWWU) filed a required depreciation study on January 10. This is AWWU's first such study since 1985.

Depreciation expense is the largest single expense paid by a utility and it can have a major impact on utility rates.

AWWU will be filing a rate case before the end of this year incorporating the adjudicated results of the depreciation study.

Responsive to commission request, the Attorney General/RAPA filed a notice of election to participate in the case on February 8. A hearing has been scheduled for April 7. RAPA has contracted with an expert witness to assist in

analyzing the utility's filing and to provide expert testimony at hearing.

Torts and Workers' Compensation

In a hearing before the Alaska Workers' Compensation Board this month, AAG Dan Cadra defended the state as employer in a matter including claims for additional temporary total disability, requests for imposition of penalties, and a request by the employee for reimbursement for loss of retirement benefit seniority and refund of annual leave due to a delay in the report from an independent medical examination requested by the board. The state argued that additional benefits were not owed past the date of "medical stability;" whereas the employee claimed she was owed benefits until she was released to work by her chiropractor. The board's independent medical examination physicians opined that the employee was medically stable prior to her ultimate return to work. The state opposed a penalty on the grounds that all benefits due were timely paid and benefits were timely controverted. A decision is expected within 30 days.

Brown v. LGD, Inc. The section argued this case before the Alaska Supreme Court. The state intervened post-trial in this wrongful death case to respond to a challenge to the constitutionality of AS 09.17.010(b), the cap on non-economic damages, and the interpretation of that statute. The state argued that multiple statutory beneficiaries in a wrongful death case must share one capped award of damages, based on the text of the statute, its specific legislative history, and the overall purposes and intent of the 1997 tort reform package. With respect to the constitutionality of the caps, the state argued that the court has repeatedly declined to re-examine the *Evans* plurality opinion's conclusions that the caps are constitutional, and that this case did not present any reason to depart from the growing body of Alaska law accepting the caps as an appropriate

exercise of legislative policy-making power. There was very limited questioning from the Court on the state's post-trial issues; oral argument focused in large part on the underlying liability issues in the case (on which the state took no position). Briefing and oral argument of the state was handled by AAG Ruth Botstein.

CRIMINAL DIVISION

Anchorage DAO

Anchorage conducted 9 trials and 59 grand juries this month. Here are some highlights.

ADA John Skidmore tried Osaasi Saafi for the murder of his cousin's boyfriend. The abusive boyfriend had threatened the defendant's family, though no weapons were involved. The defendant armed himself and pursued the victim as the victim was leaving the area. When the victim turned to confront the defendant again, Saafi shot the victim seven times. The DAO's theory was "more force than necessary" and the jury convicted of second degree murder.

ADA Trina Sears tried Jack Dwight for first degree sexual assault of his wife. The trial took so long to convene that the wife lost interest in the prosecution and had to be the subject of a multi-state manhunt on a material witness warrant. She was found and arrested in Louisiana. In what can only be described as a learning experience, the offices came to understand that a live, police witness in a Louisiana courtroom was the only way that Louisiana would honor the out-of-state subpoena. The Anchorage Police Department agreed to send their case officer in lieu of a state trooper. After three days of flying and testifying, the officer finally brought the victim back to Alaska to testify against her husband. After DAO produced the victim and announced that it would take two days to finish the trial, the defense demanded a mistrial, because the trial was going to have to be delayed three weeks for

a defense attorney vacation. The motion was granted. The DAO prays that the victim (who re-engaged in the process) will hang in and appear for the next trial.

ADAs Paul Miovas and Marika Athens tried a co-defendant armed robbery case. After three days of jury selection, the more culpable defendant pled guilty to robbery one. The remaining co-defendant tried to subpoena ADA Miovas to “discuss” the deal, but the judge quashed the subpoena. ADA Athens finished the trial while ADA Miovas studied for the bar exam. Once the jury returned its guilty verdict, the defense attorney stomped out of the courtroom, clearly miffed that her less culpable defendant had been convicted of anything.

ADA Ben Hofmeister tried Dwayne English for felony promoting prostitution. In a nifty exchange during cross-examination, English admitted that he would definitely pimp out the woman who was the victim of the crime, just “not on this night.” The entire trial took one day, a modern-day record for Anchorage.

ADA Dan Shorey tried Johnny Johnson, an Oklahoma man who had just been released from interstate probation supervision. Johnson picked up a fellow who was walking in downtown Anchorage and offered him a ride home. He accepted an invitation to go into the home to party with the man and his two older roommates. Once inside, Johnson, who seems to have significant anger and mental health issues, slashed all three men with a box cutter, including one who was sleeping on a sofa. The jury convicted on three counts of attempted murder.

ADA Brittany Dunlop convicted frequent-flyer Shawn Davis for felony theft, fulfilling her part in slowing the revolving door of property crimes and criminals.

Bethel DAO

Twenty-year-old Wilfred Murphy was charged with murder one (and other felonies) surrounding allegations he shot a man in the face at close range with a shotgun. This crime was committed in Kotlik.

A sixteen-year-old was sentenced as an adult for assault in the first degree in the strangulation of a thirteen-year-old girl. He drove her to a secluded area on a four wheeler, walked behind her and choked her out. He left her in the snow, unconscious, without shoes or proper clothing. The sentencing was left to the judge. He received fourteen years with seven suspended and ten years of probation. ADA Tom Jamgochian was the prosecutor and the crime occurred in Kwethluk.

Frank Baker was sentenced on a 2005 case handled by AAG Teresa Foster. Baker had a string of alcohol facilitated sexual assaults that had been screened out or never referred to the DAO over the years. The 2005 case prompted review of all of those and resulted in an indictment with multiple victims over multiple years. The case was very complicated and involved extensive motion-work. The offices greatly appreciated AAG Foster’s assistance and congratulate her on a good result with very difficult facts. Baker committed his crimes mostly in Bethel.

Nineteen-year-old Darren Peterson pled to murder two in the shooting death of his uncle. Peterson shot his uncle in the body at close range with a 30-06. This crime was committed in Mountain Village.

Defendants changed their pleas or were sentenced to various other felonies including sexual abuse of a minor, felony assault, drug and alcohol offenses and vehicle theft. ADA David Buettner, ADA A.J. Barkis, ADA Tom Jamgochian and DA Joanis handled these cases. The offices also had approximately thirty indictments for crimes ranging

from sexual assault in the first and second degrees, assaults, manufacture of alcohol in a dry area, and vehicle theft. ADA Chris Carpeneti has moved into a position where he is handling a felony caseload in addition to a portion of Bethel misdemeanors and the villages of Chevak and Aniak.

Fairbanks DAO

Marvin Wright was sentenced to 119 years for the murder of Tricia Warren and the robbery of the convenience store where she was working alone when Wright gunned her down in September 1995. Warren was shot between the eyes and again in the head in a coup-de-grace. Wright was convicted of the charges last July following a month-long jury trial. There was no forensic evidence and the gun was never recovered. Trial evidence against Wright largely consisted of the testimony of two of Wright's former drug associates who witnessed the murder, another drug associate to whom Wright tried to trade a gun and some bloody money for drugs on the morning of the murder, two former cellmates to whom Wright had made some admissions, and others in the criminal milieu to whom he bragged about Warren's murder.

The case was solved after Fairbanks Police Department Detective Meredith reopened the investigation in 2005 and convinced the eyewitnesses to speak out at last about what had happened. Wright will be transported back to Lompoc, California to finish a federal drug sentence before coming back to Alaska's custody to serve his time on this case. This was a very good result given the relative lack of culpable physical evidence, and kudos go to ADA Corinne Vorenkamp (especially given that she was eight months pregnant at the time of trial).

A 24-year-old Fairbanks man was arrested for murder in the second degree following the grand

jury's indictment for the August 2007 death of a 21-month-old child. On August 11, the toddler was found not breathing and with a broken arm after the man had been in charge of the child's care while his live-in girlfriend, and mother of the child, was temporarily out of the home. Although an early suspect in the case, charges were not forwarded to the grand jury until after receipt of a final report from the state medical examiner's office. At present the man remains in custody on \$250,000 bail. A summer trial date is expected.

The grand jury also indicted a 20-year-old Fort Yukon "Little Dribblers" basketball coach for sexual abuse of a minor in the first and second degrees. He was also charged by misdemeanor complaint with supplying his minor victim with alcohol, following his January abuse of a 13-year-old female athlete on his team. The abuse was reported to the Fort Yukon Police Department by the girl's mother after viewing revelations in her daughter's diary. The matter was subsequently referred to a child abuse investigator with the Alaska State Troopers for investigation. Fortunately for all the other athletes on his team, this coach will have to watch March madness from the TV pod at the Fairbanks Correctional Center where he remains in custody in lieu of \$100,000 bail pending his scheduled April trial date.

The grand jury returned 39 indictments during the month. The office also had nine cases go to trial, including a felony DWI in which the defendant decided to plead guilty after jury selection.

Kenai DAO

The grand jury kept busy with assaults this month, including both domestic and non-domestic violence.

In one case, a defendant on third party release for a felony drug case got into an argument with

his third party custodian and tried to run her over. Needless to say, he remains in jail at this time.

In a particularly vicious rape case, the boyfriend's best friend showed up at the house while the boyfriend was away on vacation. He brutalized the victim and then claimed that he blacked out. He later decided that saying it was consensual would be a better defense.

In a series of domestic violence cases, the victims were strangled or threatened with deadly weapons. Some recanted but the office's domestic violence ADA Angela Jamieson persevered.

In one morning session, the grand jury heard two motor vehicle collision cases. With several victims in the hall in casts and slings, it looked more like the emergency room of the hospital than the courthouse. In one collision, a very intoxicated snow machine driver struck two teenage girls riding on another snow machine. One of the girls had multiple broken bones. In the other collision, one vehicle turned into the oncoming traffic lane. The innocent driver suffered a broken hip as well as other broken bones. His teenage daughter passenger was less severely injured.

An attack at Nikiski high school resulted in a teenage boy being struck by another teenager with a chair directly in the face. At the time of grand jury the doctors were still waiting for the swelling to subside to determine the extent of the damage to the victim. The fight occurred because the defendant did not want the victim to be in the computer room, and when the victim wouldn't leave, the defendant slammed him in the face with the chair.

In another case, a neighbor who the victims did not know, broke into their house and held a gun to the husband's throat, demanding drugs. Because it was four in the morning, the husband had answered the door with a gun in his hand. A standoff occurred when the husband put his

gun to the defendant's temple. Ultimately the defendant backed off and left, at which time the victims immediately called the troopers who found the man at the house next door.

The final assault of the month for the grand jury was a man who kicked in the door of the building where the victims were sleeping and tried to get them to give him their car. When he left—the first time—the victims called the police; but then he kicked in the door again and this time stole the car keys and then the car. A 25-mile high-speed chase resulted with the defendant being stopped safely. It was later discovered that he had stolen a first vehicle from Anchorage and abandoned it shortly before stealing the next vehicle.

There was also a bit of humor at grand jury from a defendant on felony probation who came to the probation office prepared to provide a urinalysis – just not his own. He had donned a Whizzinator and provided a sample that unfortunately for him was at the wrong temperature and pH.

ADA Dev Hill convinced a jury to convict a defendant of shoplifting at the local Three Bears. Despite most of the crime being on video, the defendant had a variety of excuses for not knowing the items had not been paid for. She was unconvincing. At sentencing, however, the judge gave her community work service in lieu of jail.

ADA Kelly Lawson had an assault trial in which the defendant ran a light and the defendant's car wound up on top of the hood of the victim's car. Fortunately for the victim, but less fortunately for the trial, the victim received almost no injuries. The jury convicted on an assault four and driving while intoxicated, with the defendant having pled to driving while suspended prior to trial so the jury did not hear those facts.

This month finally resolved the case of the bookkeeper who embezzled over a quarter of a million dollars from a local seafood packing

business. Sheryl Dilley, who had been previously convicted of forgery, was sentenced to ten years in jail with five years suspended, ten years of probation, and was required to repay \$273,174.57.

Kodiak DAO

A Kodiak man was arrested for attempting to stab another man in a fight that broke out in a local cannery bunkhouse. The grand jury indicted Jonathan Cary for several felony assault counts after he was arrested at the scene. Kodiak police officers who responded to the reported stabbing were pulled away from a complaint involving a man discharging bear pepper spray in a local bar. That individual was arrested the following night when he returned to the same bar and discharged the bear pepper spray a second time.

During the month several individuals pled to felonies and are now awaiting sentencing:

A Kodiak man pleaded to felony charges arising from his taking the truck of another local man and setting it on fire. The victim's truck was parked at the local hospital while he was attending the birth of his first child. Christopher Clark is pending sentencing on that offense.

A Port Lyons man who pleaded to a felony domestic violence assault and misdemeanor escape charges is pending sentencing.

A man from Maine was convicted following his plea to felony failure to register as a sex offender. His criminal history in Maine is extensive requiring several weeks to research before the matter will be concluded before Judge Bolger.

An Idaho fugitive pleaded to felony assault and is pending sentencing. Following service of jail time in Alaska, he will likely be removed by the Idaho authorities to serve time there.

A Kodiak man who had been discharged from the Alaska Aerospace Development Corporation was arrested and indicted for felony theft and terroristic threatening. He is pending pretrial proceedings.

Kotzebue DAO

In Kotzebue, Bert Flood pressed forward with his jury trial. Flood was charged with sexually assaulting his 14-year-old daughter, an accusation strengthened by the recovery of DNA consistent with his own. ADA Paul Roetman tried the case efficiently, with the jury interrupting brief deliberations only for takeout and to ask whether additional sex felonies could be added. Sentencing is set for June.

Nome DAO

In Nome, Darla Longley entered her guilty plea to manslaughter. Last July, Longley took the wheel of her husband's pickup truck with four passengers aboard, including her two teenage daughters and Kavi Goldsberry. Longley crashed the truck just a mile east of town, scattering debris for several hundred feet and killing Goldsberry. Longley's blood held 2½ times the legal limit of alcohol, and data recovered from the truck showed that at the crash she had accelerated to 80 miles per hour, with the throttle increasing. Her sentencing is set for July.

Palmer DAO

Micah Beshaw was convicted after a jury trial in Glennallen of kidnapping, attempted kidnapping, attempted sexual assault in the first degree, two counts of assault in the third degree, and assault in the fourth degree. Two and a half months after he was released on parole for a Palmer sexual assault in the first degree conviction, Beshaw stopped a woman bicyclist on the highway saying he need help with his stuck truck.

The woman told him to wait for her friends to arrive (they were doing a bicycling fundraiser for cancer). At that point, Beshaw pulled the victim off her bike and started dragging her into the woods. The victim resisted, and Beshaw ran away when the next cyclist arrived. While driving out of the woods and onto the highway, he almost hit a third cyclist. Beshaw was identified by his vehicle and through the short interaction with the victim and one of the other cyclists. At trial, the state called three prior victims to show his intent. Beshaw elected to testify and try to explain his conduct, and, by doing so, eliminated the issue of whether he was the perpetrator. The trial prosecutor was ADA Rachel Gernat.

Bryan Herrera, a former Anchorage police officer, was indicted for possessing child pornography. Herrera, who is already on parole for possession of child pornography and indecent viewing, obtained a computer and downloaded and viewed over 100 images of child pornography. Herrera claimed the images were child erotica, not pornography. ADA Rachel Gernat handled this case.

Keir McGee-Vermont was charged with assault in the first and second degrees for shaking his three-month-old baby. When medics and police arrived, the infant was on the floor in respiratory distress. McGee-Vermont admitted to being frustrated, throwing the baby into the crib, and shaking her until she went limp. ADA Rachel Gernat prosecuted this case.

Judge Kari Kristiansen sentenced Christopher Sisneros to serve five years in prison for burglary in the first degree, criminal mischief in the third degree and theft. Sisneros pled open to all the charges and admitted the aggravating factor of repeated instances of similar conduct based on out-of-state convictions for burglary and criminal trespass. Due to the age and elements of the out-of-state convictions, Sisneros was not presumptive under the sentencing scheme. ADA Suzanne Powell prosecuted this case for the state.

Brothers Jesse Bishop, Bernt Bishop and Luke Bishop were indicted on a host of charges stemming from heroin possession and dealing. Jesse Bishop was indicted on three counts of misconduct involving a controlled substance in the second degree, and three counts of misconduct involving a controlled substance in the fourth degree, all involving his sales of heroin to an undercover informant. The transactions were videotaped. Bernt Bishop was indicted on three counts of misconduct involving a controlled substance in the second degree, three counts of misconduct involving a controlled substance in the fourth degree, and one count of reckless endangerment. He was selling heroin in the presence of a small child. Luke Bishop was indicted on one count of attempted misconduct involving a controlled substance in the second degree. The prosecutor was ADA Rick Allen.

Christopher Hoffman was sentenced to a total of five years in prison with 1½ years suspended on charges of criminal mischief in the third degree, assault in the fourth degree, and reckless endangerment. The defendant abused the victim over the course of two days, at times in front of their children, and trashed the house. ADA Rick Allen tried this case.

Christopher Lingenfelter was convicted after a jury trial in Palmer of resisting arrest and disorderly conduct. The case involved events that transpired when troopers responded to a domestic violence call. When they arrived, Lingenfelter challenged the troopers to fight, forcing them to use a Taser on him and wrestle him to the ground. Lingenfelter was also charged with assault in the fourth degree for assaulting his mother, but claimed self-defense, and was acquitted on that count. The trial prosecutor was ADA Jarom Bangerter.

February was a tough month for some of the offices' trial prosecutors.

Charles Thorpe was acquitted of DUI and refusal after a jury trial. Thorpe was called in as a possible drunk driver and stopped in Palmer. He

failed field sobriety tests and gave three invalid samples for the Datamaster. Over the state's objection, the defense presented hearsay testimony ("My doctor told me...") about a respiratory condition which impacted defendant's ability to blow. After the trial, some jurors commented that Thorpe did not look that bad on the videotape. Trial prosecutor ADA Mike Perry did a good job presenting this challenging case to a jury.

Trial prosecutor ADA Mike Walsh ended up with a hung jury after two days of trial in a case where Mark Ferreira was charged with theft in the second degree for stealing a \$599 computer from Fred Meyer's in Wasilla. Apparently, some jurors did not think that \$599 warranted a felony conviction.

A jury declined to convict Wesley Pendleton on charges of violation of a domestic violence protection order in a case prosecuted by ADA Shawn Traini. The fact that the victim let the conduct go on for five months before reporting it appears to have influenced some jurors.

On February 29 ADA Mike Walsh convicted Chad Risinger of felony DUI and felony refusal after a jury trial in Palmer. Risinger also claimed that a medical condition impaired his ability to provide an adequate breath sample for the Datamaster but without success. The jurors went to the Wasilla Police Department and had the opportunity to blow into the Datamaster.

Fifty-three people were indicted on new felony charges by the Palmer grand juries this month.

One grand jury indicted Aaron Tolen and Michael Wilson on 12 Class B felonies and 49 Class C felonies, and indicted Kendra Butts and Amber Martin on 2 Class B felonies and 13 Class C felonies. These four co-defendants were already in custody for their various roles in the Talkeetna Halloween robbery of eight children. Three of the defendants were recently indicted by a federal grand jury on charges of felon in possession of a firearm, obstruction of justice

and conspiracy to obstruct justice. The most recent state charges stem from a string of eight burglaries during which multiple firearms and other items were stolen in the Talkeetna area shortly before Halloween. The prosecutor for this case was ADA Suzanne Powell.

Office of Special Prosecutions and Appeals (OSPA)

Appellate Unit

The appellate unit's defense of the state in criminal appellate actions resulted in the following highlights for the month.

Frank Johnson v. State. The Alaska Court of Appeals sided with the arguments of AAG Ken Rosenstein in this gruesome case. The defendant was convicted of manslaughter for not protecting his infant daughter from her mother, who was starving the infant to death. At the conclusion of the trial, the jury responded to a special interrogatory that the cause of the infant's death was not starvation, but a blow to the infant's head inflicted by the mother. AAG Rosenstein successfully argued that the manslaughter verdict should be upheld despite the fact that the defendant had no specific foreknowledge that the mother would hit the infant.

Jerry Douglas v. Zee Hyden (unpublished). In this case AAG Blair Christensen convinced the Ninth Circuit Court of Appeals to reverse the decision of U.S. District Court Judge John Sedwick to grant federal habeas relief to Douglas. Douglas was convicted by a jury in 1999 of first degree robbery of a cabdriver. In 2007, Judge Sedgwick found that Douglas's trial attorney had been ineffective for not further cross-examining the cabdriver with the tape recording of his 911 call to the police. AAG Christensen persuaded the Ninth Circuit that the attorney had made a reasonable tactical decision to not play the tape

at the trial. In the process, AAG Christensen not only saved the conviction, but also defended the opinions of the Alaska Court of Appeals and former Superior Court Judge Elaine Andrews that Douglas had received effective assistance from his trial attorney.

Tsen v. State. In a cross-appeal the Alaska Court of Appeals agreed with AAG Diane Wendlandt that the superior court committed clear error when, at sentencing, the judge thought he could not rely on facts outside the jury's verdict to sentence Tsen. The superior court's belief was based on a misreading of *Blakely v. Washington*. The superior court's error resulted in Tsen being sentenced only for one drug transaction, when he had admitted on tape to multiple weekly transactions. The judge's error, however, will not result in a re-sentencing because to do so would violate double jeopardy.

Rural Prosecution Unit

The unit attorneys traveled to Bethel much of the month, each spending one week handling various court hearings and screening cases.

AAG Regan Williams traveled to Barrow to do a five defendant sentencing on a Wainwright case. The men ranged in age from 18 to 35-years-old while the victim was 15-years-old. The defendants were convicted of felony furnishing of alcohol to a minor and sexual abuse of a minor in the second degree. Several hours after the event the victim had a breath alcohol level of .335. The sentencing was quite emotional as the courtroom was filled by the families of all the defendants, as well as the mother of the victim.

The victim's mother scolded the defendants during her sentencing remarks and told them of the great pain her child and family had endured. She told them she loved them but they had to pay for their crimes so they could come back to village and be in the family again. The defendants nodded and wept during her statement. As the defendants were led from

the courtroom each apologized to the mother for his actions and she hugged each one.

Also in Barrow, Bradford Kignak changed his plea for sexual abuse of a minor in the second degree. His prior sexual conviction will make him ineligible for good time for this offense.

SAVE THE DATE

Conference of Western Attorneys General Annual Conference, Seattle, WA – August 3-6, 2008